



DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

January 4, 2019

In Reply Refer To: 001B
FOIA Request: 18-03943-F

Jasper Craven
MuckRock News
DEPT MR 47601
411A Highland Ave
Somerville, MA 02144-2516
47601-90947708@requests.muckrock.com; jclarkcraven@gmail.com

Dear Mr. Craven,

This is the second partial initial agency decision (IAD) from Office of the Secretary, U.S. Dept. of Veterans Affairs (OSVA) to your Freedom of Information Act (FOIA) request dated and received on January 10, 2018, and assigned FOIA tracking number **18-03943-F**. You requested: "All email correspondence between VA officials and officials at the Concerned Veterans For America with email addresses ending in '@cv4a.org' between Jan. 20 and present day."

May 2, 2018, Beginning of Reasonable Searches

OSVA initiated its search for responsive records on May 2, 2018. Records that OSVA created after our search cut-off date, May 2, 2018, are not considered within the scope of your FOIA request. FOIA does not obligate agencies to create records, but only to process records that already exist as of the cut-off date. LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy FOIA request); Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that FOIA does not require agency "to create documents or opinions in response to an individual's request for information" (quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985))); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); Krohn v. DOJ, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" information sought); *Citizen's Guide on Using FOIA*, U.S. House Oversight & Gov't Reform Comm. §V.B, pp. 6 (Sept. 2012), <https://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf> ("Please be advised an agency is not obligated to create a new record to comply with a request").

Second Partial IAD Reasonable Searches Dated 5/2/18 & 6/1/18

On May 2, 2018, the OSVA FOIA Alternate FOIA Officer searched through the Outlook calendar entries of VA Secretary Wilkie and former VA Secretary David Shulkin for communication with email addresses ending in @cv4a.org. On June 1, 2018, using the e-discovery platform Clearwell, the OSVA Alternate FOIA Officer searched through the following email boxes for: communication with email addresses ending in @cv4a.org: David Shulkin, Thomas Bowman, Vivieca Wright-Simpson, Jake Leinenkugel, Darin Selnick, Camilo Sandoval, Casin Spero (current VA White House Liaison), Michael Lukach (former VA White House Liaison), and Peter O'Rourke. These searches yielded eight hundred twenty-six (826) pages of responsive emails and their attachments.

Of the aforementioned eight hundred twenty-six (826) pages, OSVA released to you one hundred seventy-nine (179) redacted pages on November 2, 2018. After reviewing the remaining six hundred forty-seven (647) pages, OSVA redacts some information with FOIA Exemption 6.

5 U.S.C. § 552(b)(6) exempts from required disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." FOIA Exemption 6 permits VA to withhold a document or information within a document if disclosure of the information, either by itself or in conjunction with other information available to either the public or the FOIA requester, would result in an unwarranted invasion of an individual's personal privacy without contributing significantly to the public's understanding of the activities of the federal government. Specifically, the information being withheld, as indicated on the enclosed documents, under FOIA Exemption 6, consists of names, identities, email addresses, personal email addresses, VA usernames, phone numbers, cellular numbers, and facsimile numbers of government employees and private citizens; we however release the names and VA email addresses of VA Senior Executives. Government employees and private citizens retain a significant privacy interest under certain circumstances, such as in instances where the release of their information could represent a threat to their well-being, harassment, or their ability to function within their sphere of employment. The government employees and private citizens whose information is at issue have a substantial privacy interest in their personal information. In weighing the private versus the public interest, except names and VA email addresses of VA Senior Executives, we find that there is no public interest in knowing the names, identities, email addresses, personal email addresses, VA usernames, phone numbers, cellular numbers, and facsimile numbers of federal civilian employees and private citizens. The coverage of FOIA Exemption 6 is absolute unless the FOIA requester can demonstrate a countervailing public interest in the requested information by demonstrating that the individual is in a position to provide the requested information to members of the general public and that the information requested contributes significantly to the public's understanding of the activities of the Federal government. Additionally, the requester must demonstrate how the public's need to understand the information significantly outweighs the privacy interest of the person to whom the information pertains. Upon consideration of the records, I have not been able to identify a countervailing public interest of sufficient magnitude to outweigh the privacy interest of the individuals whose names are redacted. The protected information has been redacted and (b)(6) inserted. Releasing even a single VA username reveals the pattern to ascertain VA usernames that VA employees use to log into VA Systems of Records; releasing VA usernames exposes the VA, its employees, and its contractors to potential hacking and information technology security liabilities and risks. "Withholding a telephone number or e-mail address, alone, is not sufficient to protect that [privacy] interest; alternate means of contacting and harassing these employees would be readily discoverable on the Internet if this court ordered their names disclosed." Long v. Immigration & Customs Enft., 2017 U.S. Dist. LEXIS 160719 (D.C. Cir. 2017).

November 2, 2018, Partial IAD & Reasonable Search Dated 5/2/18 & 6/1/18

On November 2, 2018, from the aforementioned reasonable searches dated May 2, 2018, and June 1, 2018, OSVA released one hundred seventy-nine (179) pages redacted with FOIA Exemptions 5, 6, and 7(C).

5 U.S.C. § 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 permits an agency to withhold material reflecting the thoughts, opinions, and recommendations of federal officials and consultants reviewing an issue. Under the

deliberative process privilege and FOIA Exemption 5, OSVA redacts internal government deliberations, thoughts, opinions, recommendations, and proposed solutions from federal employees and consultants reviewing VA programs in their professional capacities, as well as non-final or draft documents. The information contained in the responsive records is both predecisional and deliberative because it reflects preliminary opinions, proposed solutions, and recommendations, which do not reflect VA's final decision. Exposure of premature discussions before a final decision is made could create undue public confusion. The release of the redacted information would negatively impact the ability of federal employees and consultants to openly and frankly consider issues amongst themselves when deliberating, discussing, reviewing, proposing changes to, and making recommendations on VA programs. The information reveals the thoughts, deliberations, and opinions that, if released, would have a chilling effect on the ability of federal officials and consultants to discuss, opine, recommend or be forthcoming about the agency's issues which require full and frank assessment. Here, the disclosure of the withheld information is likely to compromise the integrity of this deliberative or decision-making process. Moreover, the predecisional character of a document is not altered by the passage of time. Bruscino v. BOP, No. 94-1955, 1995 WL 444406 at *5 (D.D. C. May 15, 1995), aff'd in part, No. 95-5212, 1996 WL 393101 (D.C. Cir. June 24, 1996).

5 U.S.C. § 552(b)(7)(C) exempts from required disclosure information law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Redacted information includes names, identities, email addresses, and VA usernames of VA law enforcement employees. The release of this information would risk impersonation of law enforcement personnel and jeopardize the health and safety of not only law enforcement personnel, but those persons the law enforcement personnel protect.

FOIA Mediation

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. Under the provisions of the FOIA Improvement Act of 2016, the following contact information is provided to assist FOIA requesters in resolving disputes:

VA Central Office FOIA Public Liaison:

Name: John Buck

Email Address: vacofoiaservice@va.gov

Office of Government Information Services (OGIS)

Email Address: ogis@nara.gov

Fax: 202-741-5769

Mailing address:

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001

FOIA Appeal

This concludes OSVA's response to FOIA request **18-03943-F**. Please be advised that should you desire to do so, you may appeal the determination made in this response to:

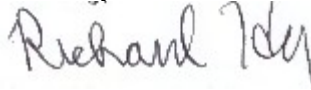
Office of General Counsel (024)
Department of Veterans Affairs

Mr. Jasper Craven
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810 Vermont Avenue, NW
Washington, DC 20420

If you should choose to file an appeal, please include a copy of this letter with your written appeal and clearly indicate the basis for your disagreement with the determination set forth in this response. Please be advised that in accordance with VA's implementing FOIA regulations at 38 C.F.R. § 1.559, your appeal must be postmarked no later than ninety (90) days of the date of this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard Ha".

Richard Ha, JD, CIPP/G
OSVA FOIA Officer

Attachments – six hundred forty-seven (647) redacted VA emails with @cv4a.org